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AVEEK SARKAR AND ANOTHER

v.

STATE OF WEST BENGAL AND OTHERS

B

(2014) 4 SUPREME COURT CASES 257
KSP RADHAKRISHNAN J
DR AK SIKRI J
[CRIMINAL APPEAL NO: 902 OF 2004†]
3 FEBRUARY 2014

C

CRIMINAL LAW: *Penal Code, 1860 - S. 292 - Obscenity - What constitutes - Test for determination of obscenity - Community standard test applicable - Hicklin, (1868) LR 3 QB 360, test not the correct test - Obscenity, held, should be determined from point of view of average* D *person and in context of contemporary mores and national standards, as concept of obscenity keeps on changing with changing social values - Message which offending object intended to convey is significant - Photograph of a nude/semi-nude woman by itself cannot be obscene - Obscenity would depend upon particular posture and background in which* E *nude woman is depicted - Looked at as a whole, it should tend to deprave and corrupt the mind and excite lustful sexual passion so as to constitute offence under S. 292 - Publication in newspaper of picture of a nude white-skinned man (renowned German tennis player) standing close to his dark-skinned nude/semi-nude fiancée (actress) and man covering* F *breast of fiancée with his hands, followed by an article conveying message to people against practice of apartheid/racism and that love triumphs over hatred - Held, photograph not obscene - Hence no offence committed under S. 292 - Magistrate erred in initiating proceedings under S. 292 IPC and S. 4 of Indecent Representation of Women (Prohibition) Act* G *without proper application of mind - High Court also erred in refusing to quash the proceedings in exercise of power under S. 482 CrPC - Proceedings quashed - Criminal Procedure Code, 1973 - S. 482 - Crimes Against Women and Children - Indecent Representation of Women (Prohibition) Act, 1986 - S. 4 - Constitution of India, Arts. 19(1)(a)* H *& (2)*

A German magazine by name *Stern* having worldwide circulation published an article with a picture of Boris Becker, a world renowned tennis player, posing nude with his dark-skinned fiancée

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† From the Judgment and Order dated 17-3-2004 of the High Court of Calcutta in Crl. Revision No. 1591 of 1994

by name Barbara Feltus, a film actress, but Boris Becker covering his fiancée's breast with his hands. The photograph was taken by the father of Barbara. The article conveyed a message to the people at large of Boris Becker being a strident protester against the pernicious practice of "apartheid". Further, it was stated that the purpose of the photograph was also to signify that love triumphs over hatred. *Sports World*, a widely circulated magazine published in India reproduced the article and the photograph as the cover story on 5-5-1993 with the caption:

> "Posing nude dropping out of tournaments, battling racism in Germany. Boris Becker explains his recent approach to life" – *Boris Becker Unmasked. Anandabazar Patrika*, a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the abovementioned photograph as well as the article on 6-5-1993, as had appeared in *Sports World.*

A practising lawyer of Kolkata, claiming to be a regular reader of *Sports World* as well as *Anandabazar Patrika* filed a complaint under Section 292 IPC against the appellants, the Editor and the Publisher and Printer of the newspaper as well as against the Editor of *Sports World* before the Sub Divisional Magistrate. The complainant alleged that the nude photograph would corrupt young minds, both children and youth of this country, and is against the cultural and moral values of our society. The complainant stated that unless such types of obscene photographs are censured and banned and the accused persons are punished, the dignity and honour of our women would be in jeopardy. The complainant also urged that the accused persons should not only be prosecuted under Section 292 IPC, but also be prosecuted under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986, since the photograph *prima facie* gives sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences.

Having regard to the precedents "on this point and being satisfied with the materials on record, the pernicious effect of picture in depraving and debauching the mind of the persons into whose hands it may come and also for other sufficient reasons to proceed further", the Magistrate took the view that the matter merits interference by not dropping the proceedings and issued process against the accused persons under Section 292 IPC. The appellant preferred a criminal revision for quashing the proceedings under Section 482 CrPC but the High Court dismissed the same.

A Allowing the appeal and setting aside the criminal proceedings, the Supreme Court

Held:

B Section 292(1) IPC makes clear that a picture or article shall be deemed to be obscene

(i) if it is lascivious;

(ii) it appeals to the prurient interest; and

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(iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene.

Later, it has also been indicated in Section 292 IPC of the applicability of the effect and the necessity of taking the items as D a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. (para 23)

E To determine what is "obscenity" *Hicklin*, (1868) LR 3 QB 360, test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak minded adults. The *Hicklin* test F is not the correct test to be applied, rather the court has to apply the "community standard test" to determine "what is obscenity". (paras 20 and 23)

R v. Butler, (1992) 1 SCR 452 (Can SC)
Towne Cinema Theatres Ltd v. R, (1985) 1 SCR 494 (Can SC), relied G on
R v. Hicklin, (1868) LR 3 QB 360, disapproved

While judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores H and national standards and not the standard of a group of susceptible or sensitive persons. The concept of obscenity changes with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. The present case relates to a situation of the year 1994 I and it is now 2014. (paras 18 and 13)

Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 : (1965) 2 Cri LJ 8
Chandrakant Kalyandas Kakodkar v. State of Maharashtra, (1969) 2 SCC 687
Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289 : 1985 SCC (Cri) 523
S. Khushboo v. Kanniammal, (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299, relied on

Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in Section 292 IPC. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse the feeling of or revealing an overt sexual desire. The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards. Further, the question of obscenity has to be examined in the context in which the photograph appears and the message it wants to convey. (paras 23 and 24)

Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 : (1965) 2 Cri LJ 8
R. v. Penguin Books Ltd., 1961 Cri Law Rev 176
Samaresh Bose v. Amal Mitra, (1985) 4 SCC 289 : 1985 SCC (Cri) 523
Brody v. R., 1962 SCR 681 (Can SC)
Bobby Art International v. Om Pal Singh Hoon, (1996) 4 SCC 1
Roth v. United States, 1 L Ed 2d 1498 : 354 US 476 (1957), relied on

The question in the present case is whether the photograph of Boris Becker with his fiancée Barbara Feltus, a dark-skinned lady standing close to each other bare-bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 IPC. Applying the community tolerance test, it cannot be said that such a photograph is suggestive of depraved minds and designed to excite sexual passion in persons who are likely to look at them and see them. The breast of Barbara Feltus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph,

A has no tendency to deprave or corrupt the minds of people in whose hands the magazine *Sports World* or *Anandabazar Patrika* would fall. (para 26)

The said picture has to be viewed in the background in which it
B was shown, and the message it has to convey to the public and the world at large. The cover story of the Magazine carries the title, "Posing nude, dropping out of tournaments, battling racism in Germany ...". Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in
C Germany and the article highlights Boris Becker's protests against racism in Germany. Boris Becker himself puts it, as quoted in the said article: "the nude photos were supposed to shock, no doubt about it ... What I am saying with these photos is that an interracial relationship is okay." Therefore, the photograph and the
D article have to be appreciated in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in society and to promote love and marriage between white-skinned man and a black-skinned woman. When viewed in that angle, the picture or the article which was reproduced by *Sports World* and
E the *Anandabazar Patrika* cannot be said to be objectionable so as to warrant proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986. (para 27 and 28)

F *Ajay Goswami v. Union of India*, (2007) 1 SCC 143 : (2007) 1 SCC (Cri) 298
R v. Butler, (1992) 1 SCR 452 (Can SC)
S Rangarajan v. P Jagjivan Ram, (1989) 2 SCC 574, relied on

When it is found that no offence has been committed by the
G accused persons under Section 292 IPC, the question whether it falls in the first part of Section 79 IPC has become academic. The Magistrate, without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the appellants. The
H Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the appellants to face the trial. The High Court, should have exercised powers under Section 482 CrPC to secure the ends of justice. (para 29)

I *Abhik Sarkar v. State*, (2005) 26 AIC 811 (Cal), reversed

R-D/52863/CR

Advocates who appeared in this case:

For the appellants - Pradeep Ghosh, Senior Advocate (Amar Dave, Abhishek Roy and Kartik Bhatnagar (for Ms Manik Karanjawala), Advocates)

For the respondents - Mohit Paul, Ms Shagun Matta (for Anip Sachthey) and Ms VD Khanna, Advocates

Chronological list of cases cited on:

S Khushboo v. Kanniammal (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299

Ajay Goswami v. Union of India (2007) 1 SCC 143 : (2007) 1 SCC (Cri) 298

Abhik Sarkar v. State (reversed) (2005) 26 AIC 811 (Cal)

Bobby Art International v. Om Pal Singh Hoon (1996) 4 SCC 1

R v. Butler (1992) 1 SCR 452 (Can SC)

S Rangarajan v. P Jagjivan Ram (1989) 2 SCC 574

Samaresh Bose v. Amal Mitra (1985) 4 SCC 289 : 1985 SCC (Cri) 523

Towne Cinema Theatres Ltd v. R (1985) 1 SCR 494 (Can SC)

Chandrakant Kalyandas Kakodkar v. State of Maharashtra (1969) 2 SCC 687

Ranjit D Udeshi v. State of Maharashtra AIR 1965 SC 881 : (1965) 2 Cri LJ 8

Brody v. R 1962 SCR 681 (Can SC)

R v. Penguin Books Ltd 1961 Cri Law Rev 176

Roth v. United States 1 L Ed 2d 1498 : 354 US 476 (1957)

R v. Hicklin (1868) LR 3 QB 360

JUDGMENT

KSP Radhakrishnan J:

[1] A German magazine by name *Stern* having worldwide circulation published an article with a picture of Boris Becker, a world renowned tennis player, posing nude with his dark-skinned fiancée by name Barbara Feltus, a film actress, which was photographed by none other than her father. The article states that, in an interview, both Boris Becker and Barbara Feltus spoke freely about their engagement, their lives and future plans and the message they wanted to convey to the people at large, for posing to such a photograph. The article picturises Boris Becker as a strident protester of the pernicious practice of "Apartheid". Further, it was stated that the purpose of the photograph was also to signify that love champions over hatred.

[2] *Sports World*, a widely circulated magazine published in India reproduced the article and the photograph as cover story in its Issue 15 dated 5-5-1993 with the caption:

A "Posing nude, dropping out of tournaments, battling racism in Germany. Boris Becker explains his recent approach to life" - *Boris Becker Unmasked*.

[3] *Anandabazar Patrika*, a newspaper having wide circulation in Kolkata, also published in the second page of the newspaper the
B abovementioned photograph as well as the article on 6-5-1993, as appeared in *Sports World*.

[4] A lawyer practising at Alipore Judge's Court, Kolkata, claimed to be a regular reader of *Sports World* as well as
C *Anandabazar Patrika* filed a complaint under Section 292 of the Penal Code, 1860 against the appellants herein, the Editor and the Publisher and Printer of the newspaper as well as against the Editor of *Sports World*, former Captain of Indian Cricket Team, late Mansoor Ali Khan of Pataudi, before the Sub-Divisional Magistrate
D at Alipore. The complaint stated that as an experienced Advocate and an elderly person, he could vouchsafe that the nude photograph appeared in the *Anandabazar Patrik*a, as well as in *Sports World*, would corrupt young minds, both children and youth of this country, and is against the cultural and moral values of our
E society. The complainant stated that unless such types of obscene photographs are censured and banned and the accused persons are punished, the dignity and honour of our womanhood would be in jeopardy.

F **[5]** The complainant also deposed before the court on 10-5-1993, *inter alia*, as follows:

> ... That Accused 1 and Accused 2 both the Editors of *Anandabazar Patrika* and *Sports World* respectively intentionally and deliberately with the help of Accused 3 for the purpose of their
G business, particularly for sale of their papers and magazines published, printed and publicly exhibited and circulated and also sold their papers and magazines, namely, *Anandabazar Patrika* and *Sports World* dated 6-5-1993 wherein the photograph of world-class lawn tennis player, namely, Boris Becker and his girlfriend
H German film actress Miss Barbara have been published in a manner in an intertwined manner wherein Boris Becker placed the hand upon the breast of Miss Barbara which have annexed in my petition with a caption 'Boris Becker Unmasked' which is absolutely obscene and lascivious in nature and which is a criminal offence. The obscene and about nude photographs show
I published by the accused persons in the mind of myself as well as society of different age groups have a very bad impact ...

[6] The learned Magistrate on 10-5-1993 passed the following order in Criminal Case Ref. Case No. C. 796 of 1993:

> Complainant is present. He is examined and discharged. No other PWs are present. It appears that a prima facie case is made out against the accused persons under Section 292 IPC. Issue summons against all the accused persons fixing 17-6-1993 for SP and appearance. Requisite at one.

[7] The complainant also urged that the accused persons should not only be prosecuted under Section 292 IPC, but also be prosecuted under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986, since the photograph *prima facie* gives a sexual titillation and its impact is moral degradation and would also encourage the people to commit sexual offences. The accused persons on 5-3-1993 filed an application before the court for dropping the proceedings stating that there was no illegality in reproducing in *Sports World* as well as in the *Anandabazar Patrika* of the news item and photograph appeared in a magazine *Stern* published in Germany. Further, it was pointed out that the said magazine was never banned entry into India and was never considered as "obscene", especially when Section 79 of the Penal Code states that nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not reason of a mistake of law in good faith, believes himself to be justified by law, in doing it.

[8] The court after seeing the photographs and hearing the arguments on either side, held as follows:

> Moreover, until evidence comes in it will not be proper to give any opinion as to the responsibility of the accused persons. But I feel it pertinent to mention that though Section 292 does not define word 'obscene', but my rids of precedents have clustered round on this point and being satisfied with the materials on record, pernicious effect of picture in depraving and debauching the mind of the persons into whose hands it may come and also for other sufficient reasons to proceed further this Court was pleased to issue process against the accused persons under Section 292 IPC. At present having regard to the facts of the case, I find the matter merits interference by not dropping the proceedings as prayed for. It is too early to say that the accused persons are entitled to get benefit of Section 79 IPC.

A The Magistrate after holding so, held the accused persons to be examined under Section 251 CrPC and ordered that they would be put to face the trial for the offence punishable under Section 292 IPC alternatively, under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

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[9] The appellants herein preferred Criminal Revision No. 1591 of 1994 before the High Court of Calcutta under Section 482 CrPC for quashing the proceedings in Case No. C. 796 of 1993 (corresponding to TR No. 35 of 1994) pending before the learned C Judicial Magistrate Court, Alipore. Before the High Court, it was pointed out that the Magistrate had not properly appreciated the fact that there was no ban in importing the German sports magazine *Stern* into India. Consequently, the reproduction of any picture would fall within the general exception contained in D Section 79 IPC. Reference was also made to the letter dated 20-7-1993 addressed by the Assistant Editor, *Sports World* to the Collector, Calcutta Customs and a copy of the letter dated 4-10-1993 sent by the Deputy Collector, Calcutta Customs to the Assistant Editor, *Sports World*. Referring to the picture, it was E pointed out that the picture only demonstrates the protest lodged by Boris Becker as well as his fiancée against "apartheid" and those facts were not properly appreciated by the learned Magistrate. Further, it was also pointed out that the offending picture could not be termed as obscene inasmuch as nudity *per se* F was not obscene and the picture was neither suggestive nor provocative in any manner and would have no effect on the minds of the youth or the public in general. Further, it was also pointed out that the learned Magistrate should not have issued summons without application of mind. The High Court, however, did not G appreciate all those contentions and declined[1] to quash the proceedings under Section 482 CrPC, against which this appeal has been preferred.

[10] Shri Pradeep Ghosh, learned Senior Counsel, appearing for the appellants, submitted that the publication in question as well H as the photograph taken, as a whole and in the background of facts and circumstances, cannot be said to be *per se* "obscene" within the meaning of Section 292(1) IPC so as to remand a trial

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1. *Abhik Sarkar v. State*, (2005) 26 AIC 811 (Cal)

of the appellants in respect of the alleged offence under Section 292(1) IPC. The learned counsel pointed out that obscenity has to be judged in the context of contemporary social mores, current socio-moral attitude of the community and the prevalent norms of acceptability/susceptibility of the community, in relation to matters in issue. In support of this contention, reliance was placed on the Constitution Bench judgment of this Court in *Ranjit D. Udeshi v. State of Maharashtra*[2]. Reference was also made to the judgment of this Court in *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*[3]. Few other judgments were also referred to in support of his contention.

[11] The learned Senior Counsel also pointed out that the learned Magistrate as well as the High Court have completely overlooked the context in which the photograph was published and the message it had given to the public at large. The learned Senior Counsel also pointed out that the photograph is in no way vulgar or lascivious. The learned Senior Counsel also pointed out that the courts below have not properly appreciated the scope of Section 79 IPC and that the appellants are justified in law in publishing the photograph and the article which was borrowed from the German magazine. The learned Senior Counsel also pointed out that such a publication was never found to be obscene even by the State authorities and no FIR was ever lodged against the appellants and a private complaint of such a nature should not have been entertained by the learned Magistrate without appreciating the facts as well as the law on the point. The learned Senior Counsel pointed out that the High Court ought to have exercised jurisdiction under Section 482 CrPC.

[12] Shri Mohit Paul, learned counsel, appearing for the respondents, submitted that the courts below were justified in holding that it would not be proper to give an opinion as to the culpability of the accused persons unless they are put to trial and the evidence is adduced. The learned counsel pointed out that the question whether the publication of the photograph is justified or not and was made in good faith requires to be proved by the appellants since good faith and public good are questions of fact

2. AIR 1965 SC 881 : (1965) 2 Cri LJ 8
3. (1969) 2 SCC 687

and matters for evidence. The learned counsel pointed out that the learned Magistrate as well as the High Court was justified in not quashing the complaint and ordering the appellants to face the trial.

Test Of Obscenity And Community Standards

[13] The Constitution Bench of this Court in the year 1965 in *Ranjit D. Udeshi*[2] indicated that the concept of obscenity would change with the passage of time and what might have been "obscene" at one point of time would not be considered as obscene at a later period. The judgment refers to several examples of changing notion of obscenity and ultimately the Court observed as follows: (AIR p. 888, para 18)

> 18. ... The world, is now able to tolerate much more than formerly, having become indurated by literature of different sorts. The attitude is not yet settled. ...

This is what this Court has said in the year 1965.

[14] Again in the year 1969, in *Chandrakant Kalyandas Kakodkar*[3], this Court reiterated the principle as follows: (SCC p. 694, para 12)

> 12. ... The standards of contemporary society in India are also fast changing.

The abovementioned principle has been reiterated in *Samaresh Bose v. Amal Mitra*[4] by laying emphasis on contemporary social values and general attitude of ordinary reader. Again in 2010, the principle of contemporary community standards and social values have been reiterated in *S Khushboo v. Kanniammal*[5].

[15] This Court in *Ranjit D. Udeshi*[2] highlighted the delicate task to be discharged by the courts in judging whether the word, picture, painting, etc. would pass the test of obscenity under Section 292 of the Code and the Court held as follows: (AIR p. 887, para 16)

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2. *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881 : (1965) 2 Cri LJ 8
3. *Chandrakant Kalyandas Kakodkar v. State of Maharashtra*, (1969) 2 SCC 687
4. (1985) 4 SCC 289 : 1985 SCC (Cri) 523
5. (2010) 5 SCC 600 : (2010) 2 SCC (Cri) 1299

> 16. ... The Penal Code does not define the word 'obscene' and this delicate task of how to distinguish between that which is artistic and that which is obscene has to be performed by courts, and in the last resort by the Supreme Court. The test must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not. None has so far attempted a definition of obscenity because the meaning can be laid bare without attempting a definition by describing what must be looked for. It may, however, be said at once that treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more. The test of obscenity must square with the freedom of speech and expression guaranteed under our Constitution. This invites the court to reach a decision on a constitutional issue of a most far-reaching character and it must beware that it may not lean too far away from the guaranteed freedom.

Applying the above test, to the book *Lady Chatterley's Lover*, this Court in *Ranjit D Udeshi*[2] held that in treating with sex the impugned portions viewed separately and also in the setting of the whole book passed the permissible limits judged of from our community standards and there was no social gain to the public which could be said to preponderate the book must be held to satisfy the test of obscenity.

[16] The novel *Lady Chatterley's Lover* which came to be condemned as obscene by this Court was held to be not obscene in England by the Central Criminal Court. In England, the question of obscenity is left to the jury. Byrne, J., the learned Judge who presided over the Central Criminal Court in *R. v. Penguin Books Ltd*[6]. observed as follows:

> In summing up His Lordship instructed the jury that: they must consider the book as a whole, not selecting passages here and there and, keeping their feet on the ground, not exercising questions of taste or the functions of a censor. The first question, after publication was: Was the book obscene? Was its effect taken as a whole tend to deprave and corrupt persons who were likely, having regard to all the circumstances, to read it? To deprave meant to make morally bad, to pervert, to debase or corrupt

2 *Ranjit D. Udeshi v. State of Maharashtra*, AIR 1965 SC 881 : (1965) 2 Cri LJ 8

6 1961 Cri Law Rev 176

A morally. To corrupt meant to render morally unsound or rotten, to destroy the moral purity or chastity, to pervert or ruin a good quality, to debase, to defile. No intent to deprave or corrupt was necessary. The mere fact that the jury might be shocked and disgusted by the book would not solve the question. Authors had a right to express themselves but people with strong views were B still members of the community and under an obligation to others not to harm them morally, physically or spiritually. The jury as men and women of the world, not prudish but with liberal minds, should ask themselves was the tendency of the book to deprave and corrupt those likely to read it, not only those reading under C guidance in the rarefied atmosphere of some educational institution, but also those who could buy the book for three shillings and six pence or get it from the public library, possibly without any knowledge of Lawrence and with little knowledge of literature. If the jury were satisfied beyond reasonable doubt that the book was obscene, they must then consider the question of D its being justified for public good in the interest of science, literature, art or learning or other subjects of general concern. Literary merits were not sufficient to save the book, it must be justified as being for the public good. The book was not to be judged by comparison with other books. If it was obscene then if E the defendant has established the probability that the merits of the book as a novel were so high that they outbalanced the obscenity so that the publication was the public good, the jury should acquit.

[17] Later, this Court in *Samaresh Bose*[4], referring to the Bengali F novel *Prajapati* written by Samaresh Bose, observed as follows: (SCC p. 317, para 35)

> 35. ... We are not satisfied on reading the book that it could be considered to be obscene. Reference to kissing, description of the body and the figures of the female characters in the book and G suggestions of acts of sex by themselves may not have the effect of depraving, debasing and encouraging the readers of any age to lasciviousness and the novel on these counts, may not be considered to be obscene. It is true that slang and various unconventional words have been used in the book. Though there is no description of any overt act of sex, there can be no doubt H that there are suggestions of sex acts and that a great deal of emphasis on the aspect of sex in the lives of persons in various spheres of society and amongst various classes of people, is to be found in the novel. Because of the language used, the episodes in relation to sex life narrated in the novel, appear vulgar and may

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4 *Samaresh Bose v. Amal Mitra*, (1985) 4 SCC 289 : 1985 SCC (Cri) 523

> create a feeling of disgust and revulsion. The mere fact that the various affairs and episodes with emphasis on sex have been narrated in slang and vulgar language may shock a reader who may feel disgusted by the book does not resolve the question of obscenity.

We have already indicated, this was the contemporary standard in the year 1985.

[18] We are, in this case, concerned with a situation of the year 1994, but we are in 2014 and while judging as to whether a particular photograph, an article or book is obscene, regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons.

Hicklin Test

[19] In the United Kingdom, way back in 1868, the Court laid down the *Hicklin* test in *R v. Hicklin*[7] and held as follows: (QB p. 371)

> ... the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.

[20] The *Hicklin*[7] test postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults. The United States, however, made a marked departure. Of late, it felt that the *Hicklin* test[7] is not correct test to apply to judge what is obscenity. In *Roth v. United States*[8], the Supreme Court of United States directly dealt with the issue of obscenity as an exception to freedom of speech and expression. The Court held that the rejection of "obscenity" was implicit in the First Amendment. Noticing that sex and obscenity were held not to be synonymous with each other, the Court held that only those sex-related materials which had the tendency of "exciting lustful thoughts" were found to be obscene and the same has to be judged from the point of view of an average person by applying contemporary community standards.

7 (1868) LR 3 QB 360

8 1 L Ed 2d 1498 : 354 US 476 (1957)

[21] In Canada also, the majority held in *Brody v. R.*[9] that D.H. Lawrence's novel *Lady Chatterley's Lover* was not obscene within the meaning of the Canadian Criminal Code.

[22] The Supreme Court of Canada in *R v. Butler*[10] held that the dominant test is the "community standard problems test". The Court held that explicit sex that is not violent and neither degrading nor dehumanising is generally tolerated in Canadian society and will not qualify as the undue exploitation of sex unless it employs children in its production. The Court held, in order for the work or material to qualify as "obscene", the exploitation of sex must not only be a dominant characteristic, but such exploitation must be "undue". Earlier in *Towne Cinema Theatres Ltd. v. R*[11] the Canadian Court applied the community standard test and not the *Hicklin* test[7].

Community Standard Test

[23] We are also of the view that *Hicklin* test[7] is not the correct test to be applied to determine "what is obscenity". Section 292 of the Penal Code, of course, uses the expression "lascivious and prurient interests" or its effect. Later, it has also been indicated in the said section of the applicability of the effect and the necessity of taking the items as a whole and on that foundation where such items would tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see or hear the matter contained or embodied in it. We have, therefore, to apply the "community standard test" rather than the "*Hicklin* test"[7] to determine what is "obscenity". A bare reading of sub-section (1) of Section 292, makes clear that a picture or article shall be deemed to be obscene

(i) if it is lascivious;

(ii) it appeals to the prurient interest; and

(iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene.

9 1962 SCR 681 (Can SC)

10 (1992) 1 SCR 452 (Can SC)

11 (1985) 1 SCR 494 (Can SC)

7 *R.* v. *Hicklin*, (1868) LR 3 QB 360

Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in the section. A picture of a nude/semi-nude woman, as such, cannot *per se* be called obscene unless it has the tendency to arouse the feeling of or revealing an overt sexual desire. The picture should be suggestive of deprave mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the particular posture and the background in which the nude/semi-nude woman is depicted. Only those sex-related materials which have a tendency of "exciting lustful thoughts" can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards.

Message And Context

[24] We have to examine the question of obscenity in the context in which the photograph appears and the message it wants to convey. In *Bobby Art International v. Om Pal Singh Hoon*[12], this Court while dealing with the question of obscenity in the context of film called *Bandit Queen* pointed out that the so-called objectionable scenes in the film have to be considered in the context of the message that the film was seeking to transmit in respect of social menace of torture and violence against a helpless female child which transformed her into a dreaded dacoit. The Court expressed the following view: (SCC p. 15, para 27)

> 27. *First, the scene where she is humiliated, stripped naked, paraded, made to draw water from the well, within the circle of a hundred men. The exposure of her breasts and genitalia to those men is intended by those who strip her to demean her. The effect of so doing upon her could hardly have been better conveyed than by explicitly showing the scene. The object of doing so was not to titillate the cinemagoer's lust but to arouse in him sympathy for the victim and disgust for the perpetrators.* The revulsion that the Tribunal referred to was not at Phoolan Devi's nudity but at the sadism and heartlessness of those who had stripped her naked to rob her of every shred of dignity. *Nakedness does not always arouse the baser instinct.* The reference by the Tribunal to the film 'Schindler's List' was apt. There is a scene in it of rows of naked men and women, shown frontally, being led into the gas chambers of a Nazi concentration camp.

12 (1996) 4 SCC 1

> Not only are they about to die but they have been stripped in their last moments of the basic dignity of human beings. Tears are a likely reaction; pity, horror and a fellow feeling of shame are certain, except in the pervert who might be aroused. We do not censor to protect the pervert or to assuage the susceptibilities of the over-sensitive. *'Bandit Queen' tells a powerful human story and to that story the scene of Phoolan Devi's enforced naked parade is central. It helps to explain why Phoolan Devi became what she did: her rage and vendetta against the society that had heaped indignities upon her.* (emphasis added)

[25] In *Ajay Goswami v. Union of India*[13], while examining the scope of Section 292 IPC and Sections 3, 4 and 6 of the Indecent Representation of Women (Prohibition) Act, 1986, this Court held that: (SCC p. 170, para 70)

> 70. ... '45. ... [The] commitment to freedom of expression demands that it cannot be suppressed unless the situations created by it allowing the freedom are pressing and the community interest is endangered.'*

[26] We have to examine whether the photograph of Boris Becker with his fiancée Barbara Feltus, a dark-skinned lady standing close to each other bare-bodied but covering the breast of his fiancée with his hands can be stated to be objectionable in the sense it violates Section 292 IPC. Applying the community tolerance test, we are not prepared to say such a photograph is suggestive of deprave minds and designed to excite sexual passion in persons who are likely to look at them and see them, which would depend upon the particular posture and background in which the woman is depicted or shown. Breast of Barbara Feltus has been fully covered with the arm of Boris Becker, a photograph, of course, semi-nude, but taken by none other than the father of Barbara. Further, the photograph, in our view, has no tendency to deprave or corrupt the minds of people in whose hands the magazine *Sports World* or *Anandabazar Patrika* would fall.

[27] We may also indicate that the said picture has to be viewed in the background in which it was shown, and the message it has to convey to the public and the world at large. The cover story

13 (2007) 1 SCC 143 : (2007) 1 SCC (Cri) 298

* **Ed.**: As observed in *S. Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574, pp. 595-96 para 45.

of the magazine carries the title, "Posing nude, dropping out of tournaments, battling racism in Germany ...". Boris Becker himself in the article published in the German magazine, speaks of the racial discrimination prevalent in Germany and the article highlights Boris Becker's protests against racism in Germany. Boris Becker himself puts it, as quoted in the said article:

> the nude photos were supposed to shock, no doubt about it ... What I am saying with these photos is that an interracial relationship is okay.

[28] The message, the photograph wants to convey is that the colour of skin matters little and love champions over colour. The picture promotes love affair, leading to a marriage, between a white-skinned man and a black skinned woman. We should, therefore, appreciate the photograph and the article in the light of the message it wants to convey, that is to eradicate the evil of racism and apartheid in the society and to promote love and marriage between white-skinned man and a black-skinned woman. When viewed in that angle, we are not prepared to say that the picture or the article which was reproduced by *Sports World* and the *Anandabazar Patrika* be said to be objectionable so as to initiate proceedings under Section 292 IPC or under Section 4 of the Indecent Representation of Women (Prohibition) Act, 1986.

[29] We have found that no offence has been committed under Section 292 IPC and then the question whether it falls in the first part of Section 79 IPC has become academic. We are sorry to note that the learned Magistrate, without proper application of mind or appreciation of background in which the photograph has been shown, proposed to initiate prosecution proceedings against the appellants. The learned Magistrate should have exercised his wisdom on the basis of judicial precedents in the event of which he would not have ordered the appellants to face the trial. The High Court, in our view, should have exercised powers under Section 482 CrPC to secure the ends of justice.

[30] We are, therefore, inclined to allow this appeal and set aside the criminal proceedings initiated against the appellants. The appeal is allowed as above.